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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35225

SAN BENITO RAILROAD LLC
–ACQUISITION EXEMPTION--
CERTAIN ASSETS OF UNION PACIFIC RAILROAD COMPANY

RESPONSE OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT AND BROTHERHOOD OF RAILROAD SIGNALMEN TO SAN BENITO RAILROAD REPLY TO BMWED/BRS REPLY TO MOTION TO DISMISS NOTICE OF EXEMPTION

The Brotherhood of Maintenance of Way Employes Division/IBT ("BMWED"), and Brotherhood of Railroad Signalmen ("BRS") (referred to jointly as "Unions"), submit this response to the filing of San Benito Railroad LLC ("San Benito") titled "Reply to Motion to Dismiss Notice of Exemption".

I. BMWED/BRS RESPONSE TO SAN BENITO'S FILING OF A REPLY TO THE BMWED/BRS REPLY

1. The Unions respectfully submit that the Board should reject San Benito' s filing. Under the Board's rules, the Unions' opposition memorandum was a reply to San Benito's motion (that the memorandum was labeled an opposition does not make it any less a reply, the label merely indicated the position of the Unions since not all replies are necessarily in opposition to a motion). The Board's rules clearly state that there shall be no replies to replies. 49 C.F.R. §1104.13(c)--"A reply to a reply is not permitted". While the Board has sometimes, in appropriate cases, granted moving parties leave to respond to replies on showing of good cause, San Benito has not even moved for leave to file a reply to the Union's reply; it certainly has not demonstrated good cause for an exception to the rules. In the absence of a proper motion that demonstrates good cause for deviation from the Board's rules, San Benito's surplus filing should be ignored.

2. In the event that the Board allows San Benito's reply to the Unions' reply to be considered, the Unions submit that they should be allowed to file a response to San Benito's extra filing. Since the Board's rules ordinarily allow only one filing for each party to a proceeding, if San Benito is allowed an extra filing, principles of fairness and due process require that the Union's should have an equal right to a second filing. Such as responsive filing follows below.

II. BMWED/BRS RESPONSE TO SAN BENITO'S ARGUMENTS IN ITS REPLY TO THE UNIONS' REPLY

1. San Benito has repeated its reliance on *State of Maine-Acq. and Op. Exemption*, 8 ICC 2d 835 (1991), and its progeny. Reply to Reply at 3-5. But merely providing a second description of those decisions does not make them any more sound; restating erroneous reasoning does not make it correct. [1]

2. San Benito states that the Unions' have ignored the rationale of the *State of Maine* line of cases. Reply to Reply at 5. Apparently San Benito has ignored the BMWED/BRS opposition at pages 11-18.

3. San Benito states that the Unions' argued that "'virtually all' of the subsequent decisions following State of Maine were 'ex parte, with no challenge to the basic principal [sic] involved'". Reply to Reply at 5, referring to the Unions Reply at 13, internal quotations in San Benito Reply to Reply. San Benito's Reply does not actually quote from the Unions' Reply other than to pick from a few words used in the Union's Reply. What the Unions actually said was: "Following the *State of Maine* decision, there were a series of other cases where the exception

[1] Similarly, San Benito's argument that its planned transaction is consistent with the *State of Maine* line of cases and satisfies the standard for dismissal under those cases (Reply to Reply at 9-10) is not an answer to the Unions' argument that the *State of Maine* line of cases are contrary to the Interstate Commerce Commission Termination Act and wrongly decided.

was adopted and expanded without explanation, generally in ex parte proceedings in decisions with typically one page of discussion"; and, "Now there tends to be virtually automatic dismissal of notices of exemption based on unopposed motions to dismiss that assert that part of the deal involves an operating easement for the selling carrier where it will be responsible for all freight shipping on the line, and there are certain restrictions on freight movements (like time of day). And all of these decisions merely repeat the reasoning of the *State of Maine* decision without attempting to reconcile that reasoning with the language of the Act". Union's Brief at 13-14.

The Unions submit that their reply accurately described the *State of Maine* line of cases. Review of those decisions clearly demonstrates that there was no opposition in *State of Maine*, almost all of the other cases were similarly unopposed, and the few motions that were opposed did not involve challenges to the *State of Maine* rationale, but rather involved disputes concerning application of the *State of Maine* test in specific situations where the opposing party otherwise accepted the legitimacy of the *State of Maine* line of cases under the statute. The point is that what has been presented as a well-vetted, well-accepted, and overwhelming line of precedent is actually a restatement of the same reasoning over and over again, with nobody having challenged its legitimacy. In essence, this case is the first one in which a party has argued that *State of Maine* was wrongly decided.[2] Furthermore, it cannot be denied that the post-*State of*

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[2] San Benito challenges the Unions' assertion that virtually all of these decisions were ex parte and suggests that the Unions do not understand the term ex parte. Reply to reply at 5 n.2. But San Benito ignores the fact that the proceedings in *State of Maine* line of cases were indeed generally ex parte in that the only parties were the moving parties. *Blacks Law Dictionary* (6th Ed.) defines "ex parte" as "One side only; by or for one party; done for, in behalf of, or on the application of, one party only"; "ex parte proceeding" is defined as "Any judicial or quasi judicial hearing in which only one party is heard as in the case of a temporary restraining order". The Unions submit that review of the proceedings in the *State of Maine* line of cases shows that they were correctly described as predominantly ex parte. San Benito also argues that the Unions' objection is irrelevant because dockets in these cases are available to the public such that opponents can file oppositions (Reply to Reply at 5 n.2), but that is of no consequence. Such

Maine decisions typically contain perhaps a page of discussion.

4. San Benito has attempted to distinguish *State of Maine*, its progeny, and the current case from *Staten Island Rapid Transit Operating Authority v. I.C.C.*, 718 F.2d 533 (2nd Cir. 1983). Reply to Reply at 7. San Benito notes that SIRTOA predates *State of Maine. Id.* But San Benito ignores the fact that *SIRTOA* is appellate precedent, the issues there were actually adjudicated in contested proceedings, and *State of Maine* failed to address the contrary judicial holding in *SIRTOA.* Moreover, the attempt to distinguish SIRTOA has no force whatsoever. San Benito says the cases are different because in SIRTOA the owner of the track had a latent duty to provide freight service by virtue of owning a line that was part of the interstate rail system. *Id.* However, that argument begs the question here. Among the issues here are whether, as owner of track that is part of the interstate system that will be used in interstate commerce, San Benito is a rail carrier that has the sort of common carrier obligation described in *SIRTOA,* and whether San Benito cannot avoid its statutory obligations by contracting with Union Pacific by a non-statutory and made-up device called an "operating easement" . San Benito's argument is simply tautological-we will not be a carrier because we will not have any latent carrier obligations. But San Benito cannot define itself out of its status under the ICCTA; and the Board cannot ignore the obligations that are statutorily imposed on an entity that acquires a line that is part of the interstate system and used for interstate traffic merely because the entity defines itself as a not a

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publication usually does not result in actual interventions, much less meaningful engagement on the issues. Indeed, timely intervention in cases of this sort is unlikely unless a non-applicant/non-petitioner/non-movant happens to scan the Federal Register regularly for these types of items, manages to identify a filing as presenting these issues and actually learns of the filing within 20. Moreover, the Board itself recognizes that such filings are not actually adequate notice to the world by allowing for the filing of petitions for revocation of exemptions at any time. In any event, review of the decisions demonstrates that virtually all of them were ex parte-issued based on the filing of one party.

carrier.

5. San Benito attempts to dismiss the significance of the decisions in *DesertXpress Enterprises, LLC–Petition for Declaratory Order*, F.D. No. 34914 (June 27, 2007) (2007 WL 1833521 (S.T.B.) and *American Orient Express Railway Co. v. Surface Transportation Board*, 484 F.3d 554 (D.C. Cir. 2007). While there are indeed factual differences between the instant case and those cases, the Unions' note that the main point in citing them was that if those two entities are carriers subject to STB jurisdiction, then an entity that actually owns a rail line that connects with the interstate rail network and is actually used for interstate rail transportation must be a rail carrier subject to STB jurisdiction.

6. The fact that San Benito plans only intrastate passenger service on the line it would acquire (Reply to Reply at 10) is of no consequence. San Benito is acquiring a line that currently is, and will still be, part of the interstate system; and that will still be used for interstate transportation in the form of freight movements over the line that San Benito would own. The Unions also noted that San Benito's planned passenger operations would be over a line that physically connects with the lines used by CalTrain and Amtrak. San Benito says this is irrelevant because other cases that have held that rail operations that were purely intrastate over interstate track were not rail carrier operations. Reply to Reply at 10-11. But in those cases the intrastate rail companies providing intrastate service on track that was part of the interstate system did not also own the interstate track that was still being used for interstate operations. That San Benito says it does not plan to issue through tickets (Reply to Reply at 12) is of no moment; San Benito will be engaged in operations over lines that are part of the interstate system where passengers can connect to trains that operate over the interstate network and trains that

actually operate across state lines.[3] San Benito's plans to run passenger service that will connect with interstate passenger service merely provides further support for the conclusion that San Benito must obtain STB approval of the acquisition under Section 10901, or exemption from such approval.

7. San Benito's argument that the ICCTA had no impact on the rationale of the *State of Maine* cases and changed nothing with respect to the agency's jurisdiction over purely intrastate trackage (Reply to Reply at 8), is plainly without merit. As the Union's have shown (Reply at 5-8, 15-17 and decisions cited therein), the ICCTA broadened the STB's jurisdiction over intrastate trackage and other rail facilities, and eliminated state jurisdiction over wholly intrastate lines. San Benito asserts that the ICCTA "did not change the workings of §10901, nor did it change the meaning of a 'railroad line'". Reply to Reply at 8. But, the motion filed by San Benito seeks a declaration that the STB has no jurisdiction over San Benito's planned acquisition of UP's line. The ICCTA did, in fact, grant the STB greater and exclusive jurisdiction over intrastate lines and facilities; and did, in fact, eliminate state jurisdiction over such lines and facilities. San Benito suggests that the Board should ignore this statutory change and ignore the decisions cited by the Unions because they were federal preemption cases, some involving zoning. Reply to Reply at 8. But San Benito misses the point. In order to find preemption, the courts had to find that the Board had jurisdiction over the purely interstate track and other property at issue in those cases.

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[3] Surely San Benito does not expect the Board to believe that it intends to operate passenger trains for people to travel only between Holister and Gilroy. Unlike some of the cases cited by San Benito which involved scenic railways, day excursions and luxury dining experiences, San Benito is planning passenger service on twelve miles of line between a planned community and a small exurban city that sits on a major north-south rail line in California and is station point for CalTrain. Clearly the plan is for passengers on the planned Sab Benito service to be able to access CalTrain at the San Benito line terminus at Gilroy, where they can travel to San Jose for Amtrak trains.

If the Board has exclusive jurisdiction over such actions as elimination of railroad agencies, building intermodal facilities and removal of crossings at single locations within states, then the Board certainly has exclusive jurisdiction over the sale of an intrastate rail line that is part of the interstate rail network and is used for interstate traffic. Because the proposed transaction concerns trackage within the Board's jurisdiction, it cannot be effected without Board approval, or an exemption from Board approval, under Section 10901.

Consequently, regardless of whether *State of Maine* was consistent with the statute when that decision was issued, it is certainly inconsistent with the statute now. That UP, not San Benito, will provide the interstate service does not matter because San Benito will be acquiring a line that is part of the interstate system that is used for interstate service. Accordingly, the acquisition can occur only if authorized under Section 10901, or exempted from such authorization.

CONCLUSION

The Unions submit that San Benito's Reply to the Unions' Reply should be rejected. The Unions further submit that if the San Benito's supplemental filing is nonetheless accepted, then the Board should also accept the Unions' response which further demonstrates that San Benito's motion should be denied,

Respectfully submitted,

/s/

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Dated: June 11, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing

Response of Brotherhood of Maintenance of Way Employees Division/IBT and Brotherhood of

Railroad Signalmen to San Benito Railroad Reply to BMWED/BRS Reply

To Motion to Dismiss Notice of Exemption by overnight delivery, to the offices of the following:

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/s/
Richard S. Edelman

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